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Haviv Toledano  
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In re Application of :  
Toledano. :  
Application No.: 10/009,138 :  
Filing Date: 26 November 2001 : DECISION  
For: A FLEXIBLE ANNULAR STAPLER FOR :  
CLOSED SURGERY OF HOLLOW ORGANS :

This decision is before the PCT Legal Office for matters arising under 35 U.S.C. 371.

BACKGROUND

On 17 July 1997, applicant filed international application PCT/IB97/00887 that claimed priority of an earlier United States application which was filed 25 July 1996. A copy of the international application was communicated to the United States Patent and Trademark Office from the International Bureau on 05 February 1998. A Demand for international preliminary examination was timely filed 09 February 1998. Accordingly, the thirty-month period for paying the basic national fee for the national stage in the United States expired at midnight on 25 January 1999.

On 26 November 2001, applicant filed a Transmittal Letter (Form PTO-1390) for entry into the national stage in the United States which was accompanied by, *inter alia*, a copy of the application, a preliminary amendment and the basic national fee as required by 35 U.S.C. 371(c). These papers were assigned application number 10/009,138.

On 31 January 2003, the United States Patent and Trademark Office (USPTO) in its capacity as an Elected Office mailed out a "NOTIFICATION OF ACCEPTANCE OF APPLICATION UNDER 35 U.S.C. 371 AND 37 CFR 1.494 OR 1.495" (Form PCT/DO/EO/903) indicating that applicant had met the filing requirements of 35 U.S.C. 371(c).

On 29 April 2002, applicant filed a status request concerning this application.

### DISCUSSION

1077 OG 13 indicates:

"The Patent and Trademark Office is continuing to receive application papers which do not clearly identify whether the papers (1) are being submitted to enter the national stage of the Patent Cooperation Treaty (PCT) under 35 U.S.C. 371 or (2) are being filed as a regular national application under 35 U.S.C. 111...

If there are any conflicting instructions as to which section of the statute (371 or 111) is intended the application will be accepted under 35 U.S.C. 111. It is strongly recommended that applicant use the Form PTO-1390 in all cases where a filing under 35 U.S.C. 371 is intended."

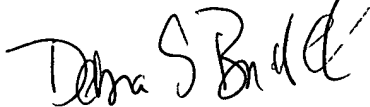
In the case of conflicting instructions, the application is to be treated as a filing under 35 U.S.C. 111. In this application, although applicant used the "Transmittal Letter for the United States Designated Office" (Form PTO-1390) as the transmittal letter, applicant also included a preliminary amendment, in which applicant indicates in the opening statement of the remarks that this application was a divisional application of an earlier filed application. Therefore, due to the conflicting instructions, this application should have been treated as a filing under 35 U.S.C. 111.

### CONCLUSION

The a "NOTIFICATION OF ACCEPTANCE OF APPLICATION UNDER 35 U.S.C. 371 AND 37 CFR 1.494 OR 1.495" (Form PCT/DO/EO/903) mailed 31 January 2003 is hereby VACATED.

This application is being forwarded to the Office of Initial Patent Examination for processing of this application in accordance with this decision.

Any further correspondence with respect to this matter should be addressed to the Mail Stop PCT, Commissioner for Patents, Office of PCT Legal Administration, P.O. Box 1450, Alexandria, Virginia 22313-1450, with the contents of the letter marked to the attention of the Office of PCT Legal Administration.



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